

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 21-557V

UNPUBLISHED

KIMBERLY EVANS,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Chief Special Master Corcoran

Filed: July 8, 2022

Show cause; failure to prosecute;
tetanus diphtheria (Td) vaccine;
Shoulder Injury Related to Vaccine
Administration (SIRVA)

Ronald C. Homer, Conway, Homer, P.C., Boston, MA, for Petitioner.

Heather L. Pearlman, U.S. Department of Justice, Washington, DC, for Respondent.

DECISION¹

On January 11, 2021, Kimberly Evans filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa—10 through 34² (the “Vaccine Act”). Petitioner alleges that she suffered a shoulder injury related to vaccine administration (“SIRVA”) from a tetanus diphtheria (“Td”) vaccination she received on May 17, 2020. ECF No. 1. Due to Petitioner’s failure to prosecute her claim, this case is **DISMISSED**.

Relevant Procedural History

In the petition, Petitioner alleged that she suffered a shoulder injury from a Td vaccination but did not provide any medical history for treatment of the injury. ECF No. 1. Petitioner did not submit any statutorily required supporting documentation with the petition.

On February 4, 2021, the PAR Initial Order issued requiring Petitioner to file these outstanding documents. ECF No. 5. Petitioner requested and received numerous motions for extension of time but did not file any supporting documents.

¹ Although I have not formally designated this Decision for publication, I am required to post it on the United States Court of Federal Claims' website because it contains a reasoned explanation for the action in this case, in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services). **This means the Decision will be available to anyone with access to the internet.** In accordance with Vaccine Rule 18(b), Petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2012).

On December 14, 2021, Petitioner's counsel filed a status report detailing various attempts to contact Ms. Evans since the filing of the petition. ECF No. 12. Counsel indicated that she has not received any replies from Ms. Evans. Counsel requested that the Court issue an order to show cause for counsel to present to Ms. Evans.

On March 28, 2022, I issued an Order to Show Cause warning that the case would be dismissed for failure to prosecute if Petitioner did not file the outstanding medical records or otherwise respond to the order. ECF No. 13.

On May 27, 2022, Petitioner's counsel filed a response to the Order to Show Cause indicating that she had sent the Order to Petitioner via a courier service and that delivery had been confirmed on May 9, 2022. ECF No. 14. To date, counsel still has not been able to communicate with Petitioner or otherwise obtain the medical records required by the PAR Initial Order.

Grounds for Dismissal

It is a petitioner's obligation to follow and respond to orders issued by a special master in a case. The failure to do so – whether on account of attorney error, inaction, or because a petitioner has failed to stay in contact and/or communicate with counsel – is grounds for the claim's dismissal. *Padmanabhan v. Sec'y of Health & Human Servs.*, 638 Fed. App'x 1013 (Fed. Cir. 2016); *Tsekouras v. Sec'y of Health & Human Servs.*, 26 Cl. Ct. 439 (1992), *aff'd*, 991 F.2d 810 (Fed. Cir. 1993) (per curiam), (“[c]ontrolling precedent considers dismissal appropriate when failure to act is deemed willful, when it is in violation of court orders, when it is repeated, and when clear warning is given that the sanction will be imposed”); *Sapharas v. Sec'y of Health & Human Servs.*, 35 Fed. Cl. 503 (1996) (“[n]ot only did petitioner fail to meet the court's . . . deadline, but he also ignored the chief special master's ‘warning’ order, clearly placing petitioner on notice that failure to respond to the court's order . . . , would result in dismissal of the claim. The chief special master clearly did not abuse his discretion in dismissing this case for failure to prosecute”); *see also* Vaccine Rule 21(b) (“[t]he special master or the court may dismiss a petition or any claim therein for failure of the petitioner to prosecute or comply with these rules or any order of the special master or the court.”).

Petitioner was specifically advised in my March 28, 2022 Order to Show Cause that her failure to follow orders issued in this matter (and failure to communicate with her counsel which prevents compliance with those order) risked dismissal of the claim. As noted in the response to the Order to Show Cause, Petitioner has been out-of-touch with her counsel since the filing of the petition in January 2021. Because Petitioner has continued to disregard my orders, without justification or explanation, dismissal is now appropriate.

As an alternative basis for dismissal, Petitioner has not filed any statutorily required documentation, including medical records or affidavits, to establish the claims in her petition. § 300aa—11(c). Without any evidence to support the elements of her

vaccine claim, Petitioner has failed to establish entitlement to compensation in the Vaccine Program.

Accordingly, this case is DISMISSED for failure to prosecute. The clerk shall enter judgment accordingly.³

IT IS SO ORDERED.

s/Brian H. Corcoran
Brian H. Corcoran
Chief Special Master

³ If Petitioner wishes to bring a civil action, she must file a notice of election rejecting the judgment pursuant to § 21(a) “not later than 90 days after the date of the court’s final judgment.”